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IN THE

Supreme Court of the United States

October Term, 958

No. 472

JOSEPH W. BOWLEY,

Petitioner,

vs.

NEW JERSEY TURNPIKE AUTHORITY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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TABLE OF CONTENTS

Petition for Writ of Certiorari to The Supreme Court of New Jersey 2

Citations to Opinion Below 2

Question Presented 5

Constitutional Provisions Involved 6

Statement of the Case 7

Argument 19

Opinion of Supreme Court of New Jersey—Appendix 1

Judgment of Supreme Court of New Jersey—Appendix 12

Cases Cited

Boom Co. v. Patterson, 98 U.S. 403 (1878) 19, 24

City of Cincinnati v. Louisville & Nashville Railroad Co. 223 U.S. 390, 32 S. Ct. 267, 56 L. Ed. 481 (1912) 17, 25, 27

City of Trenton v. Lenzner, 16 N. J. 465, 109 A. 2d 409 (1954), Cer. denied 348 U.S. 972, 75 S. Ct. 534, 99 L. Ed. 757 ..... 18, 21

Curry v. Waverly, etc. Railroad Co. 52 N.J.L. 381 (1890) 21

Emmons v. Utilities Power Co., 83 N. H. 181, 141 A. 65, 58 A.L.R. 788 20

State Highway Commissioners v. National Fireproofing Corp., 127 N.J.L. 346 (1941) 21
United States v. Powelson, 319 U. S. 266, 63 S. Ct. 1047 (1943) 19

Statutes & Authorities Cited

N.J.P.L., Ch. 454 2
N.J.P.L. 1950, Ch. 1 2
N.J.P.L. 1952, Ch. 35 2
N.J.P.L. 1953, Ch. 20 4
N.J.S.A. 20:1-16 4
N.J.S.A. 20:1-20 4
N.J.S.A. 27:23-3 2
N.J.S.A. 27:23-5(j) 2
R.S. 20:1-16 4
R.S. 20:1-20 4
R.S. 27:23-3 2
R.S. 27:23-5(j) 2
Act of June 25, 1948, Ch. 646, 62 Stat. 929 5
28 U.S. Code 1257 (3) 5
28 U.S.C.A. 1257 (3) 5
Constitution, Article I, Sec. 10, Para. 1 ..... 6, 16
Amendment XIV, Sec. 1 ..... 6, 16

SUPREME COURT OF THE UNITED STATES

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of Joseph W. Bowley, of the City and County of Burlington, in the State of New Jersey, respectfully shows:

A.

That he respectfully seeks a writ of certiorari to the Supreme Court of New Jersey which entered a judgment on the opinion of Mr. Chief Justice Weintraub, a copy of which is appended hereto and which is reported in 27 N. J. 549. (Advance Sheet No. 31 of August 15, 1958) and 143 A. 2nd 558 (Advance Sheet No. 3 of August 23rd, 1958).

B.

The New Jersey Turnpike Authority is a body corporate established in the New Jersey State Highway Department. It is an instrumentality exercising public and essential governmental functions of the State of New Jersey. N. J. P. L. 1948 c. 454, p. 1858, Paragraph 3 as amended by N. J. P. L. 1952 c. 35 p. 125, Paragraph 1; R. S. 27:23-3; N. J. S. A. 27:23-3. It was authorized to build and operate turnpike projects and to exercise the power of eminent domain in the acquisition of any land or other property reasonably necessary for any turnpike project. N. J. P. L. 1948 c. 454, p. 1860, Paragraph 5 as amended by N. J. P. L. 1950 c. 1, p. 14, Paragraph 5; R. S. 27:23-5 (j); N. J. S. A. 27:23-5 (j). It built and operates the New Jersey Turnpike which extends from Deep Water in the County of Salem in a northeasterly direction to a point near the George Washington Bridge in the

County of Bergen. After the building of the original turnpike, it determined to build a connection or branch from the original turnpike to the New Jersey-Pennsylvania State Line in the middle of the Delaware River, all within the County of Burlington, for the purpose of establishing a physical connection with the easterly terminus of the Pennsylvania Turnpike. The route selected and determined upon by it, carried the turnpike through lands owned by the Petitioner. There was also taken from the Petitioner a tract of land for the toll plaza, and still another tract for an access road to the toll plaza from an existing public highway.

At the time of the taking on September 19, 1955, there existed a written contract between the Petitioner and one T. P. Morgan, which had been entered into on April 10, 1953, wherein the Petitioner agreed to sell his tract of land and Morgan agreed to purchase the same at $5,000 per acre if the Petitioner could assemble other lands to make a contiguous tract of 400 acres. The construction of the turnpike physically severed Bowley's land from other lands which he had and from the only other lands available for an assemblage which thereby made his contract of sale impossible of fulfillment.

The Petitioner and Respondent were unable to agree on the price to be paid to the Petitioner for that part of his land which had been taken and for the severance damage to the remainder. Proceedings were therefore had pursuant to the statute before three Commissioners appointed for the purpose of determining his damage, and they made an award. Petitioner was dissatisfied with the award and took an appeal to the Superior Court of New Jersey, as the

statute enabled him to do. N. J. P. L. 1953 c. 20, p. 365, Paragraph 25; R. S. 20:1-16; N. J. S. A. 20:1-16 (Pocket Parts). In that proceeding he was entitled to, and in fact had, a trial by jury. N. J. P. L. 1953 c. 20, p. 366, Paragraph 29; R. S. 20:1-20; N. J. S. A. 20:1-20 (Pocket Parts).

At the trial before the Superior Court of New Jersey the Petitioner sought to introduce in evidence for the consideration of the jury the written contract which he had with Mr. Morgan, urging that if the contract were not admitted in evidence, the action of the trial court would constitute an impairment of the obligations of this contract in violation of the Constitution of the United States. The court excluded the contract and all testimony concerning the probability of its performance from the jury. The jury returned a verdict for $216,143, which was predicated exactly upon the testimony of the two expert witnesses for the Turnpike Authority that the value of the land taken was 3,000 per acre, and that the damage to the remainder by reason of the severance was at the rate of $500 per acre.

An appeal was taken from the judgment of the Superior Court to the Supreme Court of New Jersey, in which the failure of the trial Judge to admit the contract of sale in evidence was complained of, and which action, it was contended, costituted in the alternative a taking of the Petitioner's property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States, or the impairment of the obligations of the Petitioner's contract in violation of Section 10, Article I of the Constitution of the United States.

The jurisdiction of this Court is invoked on the theory that the failure of the trial Judge to permit the jury to consider the value of the Petitioner's land with knowledge of the terms of the contract of sale which he had, constituted an impairment of the obligations of his contract, or in the alternative the taking of his property without due process of law, both in violation of the Constitution of the United States, and that the affirmance of that ruling and the judgment predicated upon it by the Supreme Court of New Jersey, also constitutes a denial to the Petitioner of the very same constitutional rights.

I. The date and time of the entry of the judgment of the Supreme Court of New Jersey, sought to be reviewed, is June 27th, 1952.

II. No order respecting a rehearing has been sought or allowed. An order was entered herein by Mr. Justice Brennan on Sept. 25th, 1958, which extended to and including Oct. 25th, 1958, the time within which a petition for a writ of certiorari might be filed herein.

III. The statutory provision believed to confer on this court jurisdicion to review the judgment in question by writ of certiorari is the Act of June 25th, 1948, c. 646, 62 Stat. 929; 28 United States Code 1257 (3); 28 U.S.C.A. 1257 (3).

C.

The question presented for review is, in an action to determine what damages shall be paid to a property owner for the taking in condemnation of his property, and where the land taken in condemna-

tion is subject to a pre-existing contract of sale at a specified price, which contract is conditioned upon the condemnee's acquisition and sale of other lands for the purpose of creating a tract having a large acreage, is the action of the trial court in excluding that contract from the consideration of the triers of the facts an impairment of the obligations of that contract and in violation of Section 10, Article I of the Constitution of the United States, or in the alternative a deprivation of the condemnee's property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

D.

The constitutional provisions which the case involves are as follows:

Article I, Section 10; Paragraph 1:

"No State shall enter into any Treaty, Alliance, or Confederation, grant Letters of Marque and Reprisal; coin Money, emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainer, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility."

Amendment XIV.

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

E.

STATEMENT OF THE CASE

On April 10th, 1953, the Petitioner as seller and T. P. Morgan as buyer entered into a written contract for the sale and purchase of a tract of land then owned by the seller. The lands which the seller then owned consisted of approximately 204 acres. The agreement further provided that the seller would sell to the buyer "other lands situate in Florence and Burlington Townships which are to be acquired by said Bowley, to make up 400 acres of land to the said T. P. Morgan for the price of FIVE THOUSAND DOLLARS per acre; the lands which are to make up the 400 acre assemblage may be a part of the lands of John D. Marter lands and Helen, his wife, and the land or part of lands of the Sutton Estate, and the land or part of lands of the Hayes Estate; some of the above lands are under acquisition and others which are to be acquired. The said Bowley must deliver to the said T. P. Morgan a minimum of 400 acres, bounded by Schuyler Ferry Road, the River Road, and the properties of the Florence Pipe Foundry and Cedar Lane."

The same contract contained a further provision reading as follows:

"Settlement is to take place at The Office of the West Jersey Title Company, Camden, New Jersey, sixty days after the official declaration of the permanent alignment of the Pennsylvania extension of the New Jersey Turnpike has been declared. Full payment of cash to be received at the time of settlement. It is further agreed between Joseph W. Bowley and

T. P. Morgan in the event that the said Joseph W. Bowley cannot deliver 400 acres of the aforesaid property described above because of the alignment of the New Jersey Turnpike extension, the said Joseph Bowley will not be penalized or the said T. P. Morgan will not be bound by this agreement, and the said Joseph Bowley will return to the said T. P. Morgan the $1,000 paid in advance and will return any other moneys advanced by T. P. Morgan to Joseph W. Bowley." At the time this contract was executed, there was wide public discussion of the fact that a connection between the Pennsylvania and New Jersey Turnpikes would be built somewhere in the neighborhood of Bordentown or Florence in Burlington County, New Jersey, but it was not known what the precise location of the Turnpike would be.

On August 5th, 1953, Petitioner acquired the so-called Marter farm, having an acreage of approximately 45 acres. Lying between and connecting the Bowley property and the Marter farm was the Sutton Estate farm referred to in the agreement, which contained slightly more than 146 acres. The Hayes Estate with 57.91 acres and the Scott property with 10.24 acres filled in the River Road frontage between the Florence Pipe Foundry Co. and Schuyler's Ferry Road. Here was a total of 463.55 acres. In addition, Mr. and Mrs. Bauer owned a property adjoining the Bowley property on the north side which contained 44 acres. So far as the Hayes property was concerned, Bowley had made a deposit thereon of $5,000 and negotiations had proceeded to the point of a contract being drawn. Negotiations for the Scott

property proceeded to the point of a contract being drawn. Bowley had had conversations with Ernest Sutton for the purchase of the property of the Sutton Estate. Mr. Bauer appeared and testified that he had had conversations with Bowley about the sale of his property and that he was willing to sell. Bowley also produced an assignment of the Sutton Estate heirs of their right to acquire in front of their property from the State of New Jersey the riparian lands along the Delaware River. There was, therefore, a prima facie showing that Bowley was working to effect the assemblage, and that he was making progress in that direction. These proofs were heard by the trial judge alone as bearing on the admissibility of the contract of sale.

On Sept. 19, 1955, the Respondent took a portion of Bowley's property for the new turnpike right of way. It also took the center portion of the Hayes property. The laying out of the turnpike extension left the greater part of the Bowley property, the Bauer property, small parts of the Hayes and Sutton properties, and the larger part of the Scott property on the north side of the turnpike right of way. It effectively cut off any opportunity which Bowley had to assemble 400 acres on the north side of the turnpike because except for the properties hereinbefore mentioned, the Florence Pipe Foundry property is on the north side and is unavailable for any industrial real estate assemblage. The greater part of the Sutton property, all of the Marter property, and all of the Sutton rights to acquire riparian lands were left on the south side of the turnpike and, of course, the presence of the turnpike prevents them

from having any physical connection with the Scott, Hayes, Bowley, or Bauer properties on the north, and, therefore, prevented Bowley from being able to make an assemblage of 400 acres including his own 204 acres and, therefore, deprived him of the ability to perform his contract of sale and thereby impaired the obligation of Mr. Morgan under that contract to pay $5,000 per acre therefor.

Just a short distance to the south of the turnpike the Pennsylvania Railroad Company had succeeded in effecting an assemblage of several hundred acres of land, a part of which it sold to the National Gypsum Company for $3,500 an acre. It was, therefore, amply demonstrated that land in this area could easily be devoted to the sale in large tracts for industrial purposes.

At the jury trial where the damage of Bowley was to be assessed, the court refused to permit the contract of sale to be submitted to the jury and refused to permit the jury to hear the testimony offered by Bowley and his witnesses as to the efforts which he had made and the progress which he had realized in attempting to create an assemblage. The court, therefore, effectively excluded from the jury's consideration all possibility that the jury might consider in light of all of the facts and circumstances the anhanced value of the Bowley land, enhanced as it was by the existence of the contract which he had and the probability that he could perform it.

E.

The federal question was raised in the first instance in the offer of the contract of sale in evidence

and in the argument of counsel for the Petitioner in support of its being admitted. The offer of the agreement in evidence was renewed. At Page 414a of the Appendix, Line 14, the agreement was offered in evidence and objected to by counsel for the Respondent as follows:

> "Mr. Davis: You may step down. I would like to offer the agreement in evidence, your Honor.
>
> Mr. Parker: I object to it for the reasons that I stated yesterday, and for further reasons by the very terms of the agreement which shows that - - - "

Then followed the colloquy and argument of counsel during which counsel for the Petitioner stated as follows at D414a Line 39:

> "Mr. Davis: May it please your Honor, the Constitution of the United States provides that no State shall impair the obligation of any contract. You have here before you a contract entered into by Dr. Bowley with Mr. Morgan in April, 1953. It is contended here that the action of the Turnpike, which is an arm of the State of New Jersey, in condemning Dr. Bowley's property, it interfered with this contract, and interfered to the extent it impaired the obligation of the buyer to buy. That is a constitutional right of this Defendant to have his contractual right, under this instrument, considered by your Honor and by this jury."

The court then announced his ruling at D 665a Bowley could be able to fulfill his contract of sale and ruled that this testimony would be received out of the hearing of the jury (D 587a Line 17).

The court then announced his ruling at L 665a Line 26 to D 667a Line 24, at which point the offer of Exhibit D-1 in evidence was rejected. The court's ruling was announced orally and in the following manner:

> "The Court: Gentlemen, this question has given me considerable concern, because I am well aware that this document, if admissible, would be a very important document to the defendant, because it indicates, among other things, that if it were consummated, not to consider the costs of land to be acquired, that Dr. Bowley would have made a gross profit that would be very, very substantial, in view of the fact that at the time of making this agreement he held 204 acres of land, more or less. However, I do not view this proffer of evidence in the light indicated by Mr. Davis. I think that here we have a special proceeding. We have a proceeding to determine the fair compensation to be paid by the New Jersey Turnpike Authority to Joseph W. Bowley and others for the taking of 45 acres of land, more or less, on September 19, 1955, for the uses of the New Jersey Turnpike Authority in its extension to the Pennsylvania Turnpike. I think the Court, in deciding whether or not this Exhibit is admissible, has to consider these factors, namely, was there reasonable probabil-

ity of a consummation of this agreement, and could it have been reasonably anticipated that it would have been fulfilled in the near future.

"After listening to all of the evidence, and aside from the circumstances surrounding its execution and the circumstances surrounding the payment of the down payment and return of it, it would appear from all the evidence, looking at it in its most favorable light, that at the time of the execution, even the parties had some reservation as to their ability to fulfill the contract, as indicated by the language used in Article 2 of the agreement, namely, that settlement is to take place at the office of the West Jersey Title Company, Camden, New Jersey, 60 days after the official declaration of the permanent alignment of the Pennsylvania extension of the New Jersey Turnpike has been declared, and, full payment in cash to be received, etc., and that in the event that Mr. Bowley cannot deliver 400 acres of the aforesaid property described above, because of the alignment of the New Jersey Turnpike extension, the said Joseph W. Bowley will not be penalized, and the said T. P. Morgan will not be bound by this agreement, and the said Joseph Bowley will return to the said T. P. Morgan, the $1,000 paid in advance, and will return any other monies advanced by T. P. Morgan to Joseph W. Bowley. That is some of the indication of the uncertainty that existed in the minds of the parties to the agreement at the time of its execution.

"It appears further that, nothwithstanding the assiduous efforts of the seller, even down to this date, there is nothing of a credible nature to show that he was able to acquire, by actual agreement or by informal agreement, the 400 acres acquirec within the terms set out in the agreement.

"I don't think I need say more. It is the Court's opinion that this proposed agreement does not meet the test set out in the several cases dealing with the question of admissibility of evidence, having to do with proposals and plans for land being condemned by a sovereignty, in this case the New Jersey Turnpike Authority, a sovereignty of the state of New Jersey, and those cases usually hold that where the plan or proposal is conjectural or speculative in nature, the evidence of a plan or proposal is not admissible. In fact, they hold that it is error to permit such a plan or proposal to be sufficient evidence to go to the Jury. In those cases, the Court seemed to hold to the principle that before evidence of value can go to the Jury, it must be of such a nature as to be indicated for any use for which the land has a commercial value of is own, in the immediate present or in the reasonable anticipation in the near future.

"To sum up, it would appear from all the evidence, from listening to Dr. Bowley, from his explanation of how he did this, and what he proposed to do, even taking into consideration his characterization that it was a gamble, I can not help but conclude that there was not in his

mind, and, as indicated from all of the surrounding circumstances in evidence, reasonable anticipation of fullfilment of this agreement.

"For those reasons, the offer of D-1 is rejected."

"Mr. Davis: Your Honor, I assume that the practice of applying for exceptions is abolished, but I would like the record to show that the defendant does feel aggrieved by Your Honor's ruling on this question, so that he might reserve his rights to complain of it on appeal, if that becomes necessary, sir.

"The Court: Well, I think you ought to go beyond that, Mr. Davis, and have the record show now that, in addition to offering D-1, you have offered a number of supporting documents, showing attempts on the part of the defendant to fulfill the terms of the agreement set out in D-1, and, in addition, you have endeavored to have the Jury itself hear the testimony with respect to your efforts to have the Exhibit accepted in evidence, and the Court has sustained the objection, to the supporting documents, and has sustained the objection to your proposal to have the Jury hear the supporting evidence."

In the New Jersey Supreme Court the Petitioner was required by rules of court to state in his brief the questions involved. He stated the questions as follows:

"1. When an agency of the state condemns for a public purpose land which, prior to the taking by the state agency, the owner has contracted to sell in connection with other lands which he hoped to acquire, is that contract admissible in evidence at the trial of the condemnation proceeding?

2. If under the circumstances described in Question No. 1, the judge trying the condemnation proceeding takes proof out of the hearing of the jury as to the probability of the landowners being able to perform the contract and thereafter determines that the land-owner would not have in his mind any reasonable anticipation of fulfillment of the agreement and that the contract should therefore not be received in evidence, does the action of the trial judge

A. Deprive the land-owner of evidence tending to show the value of the land in light of its adaptability together with all lands to its highest and best use;

B. Deprive the land-owner of his right to trial by jury;

C. Constitute a taking of the land-owner's property without due process of law in violation of the Constitution of New Jersey and the Fourteenth Amendment to the Constitution of the United States; or

D. Constitute the impairment of the obligation of the land-owner's contract in violation of Sec-

tion 10 of Article I of the Constitution of the United States.

Although the constitutional question was clearly before the trial judge and also the Supreme Court of New Jersey, both courts rejected the Petitioner's contentions.

The Supreme Court of New Jersey dealt with the constitutional question and cited the case upon which the Petitioner placed his principal reliance in the following language, at Page 558 of 27 N. J. and. Page 563 of 143 A 2d;

> "The power of eminent domain of course is not restrained by the existence of a contract of sale and the exercise of that power does not violate the constitutional guaranty against state action impairing the obligation of contract. City of Cincinnati v. Louisville & Nashville Railroad Co., 223 U. S. 390, 32 S.Ct. 267, 56 L. Ed. 481 (1912).
> "The question, rather, is whether there is a right of compensation for the loss of the contract. A distinction has been drawn in general terms between a case in which the condemnor acquires and takes over a contract and a case in which the taking of the property frustrates the performance of a contract, compensation being allowed in the former instance and denied in the latter. 1 Orgel supra § 76, p. 330; Jahr, supra, § 114, p. 157.
>
> "The Morgan contract in no sense became part of the land. It did not further any existing enjoy-

ment or utilization of the land, nor was the land devoted to an activity which would result in the performance of the contract. Cf. City of Trenton v. Lenzner, 16 N. J. 465, 109 A. 2d 409 (1954) certiorari denied, 348 U. S. 972, 75 S. Ct. 534, 99 L. Ed. 757 (1955). The land was a farm. The contract was nothing more than a personal right of Bowley, indistinguishable from the right which a stranger to the lands would have had if Morgan had contracted with that stranger for the acquisition and sale of the acreage. Hence we fail to discern how it can be said the contract was attached to the land and condemned with it.

"Nor did Plaintiff intend to take over the Morgan contract and to appropriate to itself the benefits of that contract. It had no desire to assemble and sell lands to Morgan; its purpose was to build a turnpike extension. In fact, the contract was no longer in existence at the time of the declaration of taking, for Bowley had already terminated it by returning the deposit, and in any event the contract by its terms was then beyond performance.

"Nor was there any proof as to the value of the contract or that anyone would have paid a farthing to take over what Bowley acknowledged to be a gamble."

G.

Not applicable to this Petition.

H.

The basic rule was long ago established by this court in Boom Co. v. Patterson, 98 U.S. 403 (1878) at p. 407 and 408 in the following language of Mr. Justice Field:

> " * * * In determining the value of the land appropriated for public purposes, the same considerations are to be regarded as in a sale of property between private parties. The inquiry in such cases must be, what is the property worth in the market, viewed not merely with the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted; that is to say, what it is worth from its availability for valuable uses. Property is not to be deemed worthless because the owner allows it to go to waste, or to be regarded as valueless because he is unable to put it to any use. Others may be able to use it, and make it subserve the necessities or conveniences in life. Its capability of being made thus available gives it a market value which can be readily estimated."

More recently Mr. Justice Douglas ruled for this court in U. S. v. Powelson 319 U. S. 266 at 275, 63 S. Ct. 1047 at 1052 (1943) as follows:

> "An owner of lands sought to be condemned is entitled to their 'market value fairly determined'. U. S. v. Miller 317 U. S. 369 at 374; 63 S. Ct. 275 at 280, 87 L. Ed.—That value may reflect not only the use to which the property is presently de-

voted, but also that use to which it may be readily converted. Boom Co. v. Patterson 98 U.S. 403 24 L. Ed. 206; McCandless v. U. S. 298 U.S. 342 56 S. Ct. 764, 80 L. Ed. 1205. In that connection the value may be determined in light of the special or higher use of the land when combined with other parcels; it need not be measured merely by the use to which the land is or can be put as a separate tract. McGovern v. New York 229 U. S. 363, 33 S. Ct. 876, 57 L. Ed. 1228, 46 L.R.C., N. S., 391. But in order for that special adaptability to be considered there must be a reasonable probability of the lands in question being combined with other tracts for that purpose in the reasonably near future. Olson v. U. S. 292 U. S. 246 at 255; 54 S. Ct. 704 at 708, 78 L. Ed., 1236. In absence of such a principle, the chance of their being united for that specific use is regarded 'as too remote and speculative to have any legitimate effect upon the valuation'. McGovern v. New York supra, 229 U. S. p. 372, 33 S. Ct., p. 877, 57 L. Ed., 1228, 46 L.R.A. N. S. 391."

Mr. Justice Snow of the Supreme Court of New Hampshire stated the same rule for that Court in Emmons vs. Utilities Power Co., 83 New Hampshire 181, 141 A. 65, 58 A.L.R. 788 at 792 in the following language:

"The true rule seems to be that the enhanced market value, if any, of the plaintiff's land, due to its adaptability for valuable uses in connection with other properties, may be shown if the practicability of the combination of all of the

necessary properties upon which such availability depends was at the time of the condemnation so great as to have probably affected the public in mind, and therefore to have enhanced the price which a purchaser might be expected to give."

The State of New Jersey applies the same rule in its courts: Curry v. Waverly, etc., Railroad Co., 52 N. J. L. 381 (Court of Errors and Appeals, 1890) and State Highway Commissioners vs. National Fireproofing Corporation, 127 N. J. L. 346 at 351 (Court of Errors and Appeals, 1941).

The Supreme Court of New Jersey has recently stated the general rule for the admeasurement of the value of land in condemnation proceedings as being "the price which, in all probability, would voluntarily be agreed upon in fair negotiations between an owner willing (but not forced) to sell and a buyer willing (but not forced) to buy". City of Trenton v. Lenzner 16 N. J. 465, 109 A 2nd, 409 at 414. Certiorari denied; 348 U. S. 972, 75 S. Ct. 534, 99 L. Ed., 757.

In negotiations between a willing seller and a willing buyer, the adaptability of a parcel of land in connection with other lands for a higher and better use is a factor that would undoubtedly be given important consideration. Certainly that would be true where, as here, within a few hundred feet the Pennsylvania Railroad Company had created an assemblage of various parcels of land and had sold one large part thereof to the National Gypsum Company for $3,500 per acre. See contract of sale, Exhibit P-48 at D 719a.

The trial judge who conducted the proceedings in the Superior Court recognized this rule and permitted the Petitioner to show in whatever way he could that his land would have an adapability in connection with other lands. We do not understand counsel for the Respondent to argue against this proposition.

The next step, however, is whether the pre-existing contract of sale was evidential as tending to show the value of the land taken in condemnation when combined with other lands and adapted to the purpose of an industrial assemblage. This, the Respondent will argue and the courts below ruled, had no place in the determination of the value to be paid to the Petitioner.

If the Turnpike Authority had had to acquire the Bowley property by voluntary sale rather than by condemnation, and if it had offered to him in purchase of his land the $3,000 an acre which he was allowed for that which was taken, it would certainly have been a material consideration in the mind of the Petitioner as a proposed vendor that there already existed a contract under which he could obtain $5,000 an acre for his land if he could succeed in assembling with it a tract totaling 400 acres and it would have been a natural thing for him to have informed a prospective buyer seeking to obtain the property at a lesser price that he had such a contract. Whether or not within reasonable probability he could have succeeded in creating the assemblage of the additional acreage, is a question which might enter into the bargaining. The seller would undoubtedly consider the difficulties attendant to the

acquisition of the needed additional acreage in determining by how much he would reduce his demand below $5,000 an acre, and the purchaser would undoubtedly evaluate in his mind what the possibilities and probabilities were in determining how close to the $5,000 an acre figure he would come in making an offer.

Therefore, both the contract and the probabilities or lack of probabilities of the Petitioner's being able to acquire the need acreage were factors which would enter into the bargaining between a willing seller and a willing buyer and they should, therefore, be factors to be considered in determining what the value of the land was that was being acquired by the sovereign through the eminent domain process.

We think that the learned Chief Justice of the Supreme Court of New Jersey was mistaken when he said:

> "The Morgan contract in no sense became part of the land. It did not further any existing enjoyment or utilization of the land, nor was the land devoted to an activity which would result in the performance of the contract."

The authorities seem to be uniform that the availability of land for a higher use when coupled with other lands is a legitimate factor to be considered in determining the value of the land.

If it is true that the availability of land together with other lands for a higher and better use together than they could be put to severally, is a factor in the

determination of land values, and if it is true, as Mr. Justice Field said in Boom Company v. Patterson, that "Property is not to be deemed worthless because the owner allows it to go to waste, or to be regarded as valueless because he is unable to put it to any use. Others may be able to use it and make it subserve the necessities or conveniences in life."

The fact that the Petitioner had contracted to try to put it together with other lands, the whole assemblage of which could be put to a higher and better use, and the fact that the purchaser had agreed to pay to the Petitioner his price or reward of $5,000 for each acre so assembled, is strong evidence that the contract would further the existing enjoyment or utilization of the land which was taken and that which was damaged, and also of the fact that the land was being devoted to an activity which would result in the performance of the contract.

We also believe that the learned Chief Justice of the Supreme Court of New Jersey was also mistaken when he said that

> "The contract was nothing more than a personal right of Bowley, indistinguishable from the right which a stranger to the lands would have had if Morgan had contracted with that stranger for the acquisition and sale of the acreage. Hence we fail to discern how it can be said the contract was attached to the land and condemned with it."

The contract was more than a mere personal right of the Petitioner indistinguishable from the right of

a stranger to the lands with whom Morgan may have contracted for the acquisition and sale of the acreage. Insofar as what the Turnpike took, the contract was concerned with land which Bowley already owned and it vested in the purchaser an equitable estate subject to Bowley's being able to complete his assemblage and make title to the purchaser and subject to the purchaser's payment of the balance of the purchase price. In the case of a stranger to the title, he would have lost nothing by the condemnation because he had no title or right in the land at the time of the taking.

Perhaps the language of counsel for the Petitioner in his brief and oral argument to the New Jersey Supreme Court was awkward, but he did argue there and he argues here that it is only when the sovereign recognizes the existence of the contract of sale, when he condemns the land, and permits the evaluators to take into account what added value that contract gave to the land, if any, that he has not either been deprived of his property without due process of law on the one hand, or had the purchaser's obligation under that contract impaired.

This principle was decided by this Court in City of Cincinnati vs. Louisville and Nashville Railroad Co., 223 U.S. 390 (1911). In that case the Railroad Company instituted in a court of the State of Ohio a suit to condemn a right of way for an elevated railroad track across the public landing at Cincinnati. The City of Cincinnati filed a bill in equity to enjoin the Railroad Company from constructing the elevated railroad across the public landing and to restrain the prosecution of the Railroad's condemnation suit. The City contended that an Act of the

Legislature of Ohio of May 9th, 1908, under which the Railroad was proceeding in its condemnation proceeding was unconstitutional in that it impaired the obligation of a contract. The contract, the obligations of which were alleged to have been impaired, was the Ordinance of 1787 creating a government for the Northwest Territory embracing the territory which later became the State of Ohio. It was the contention of the City that the only power of condemnation was that contained in the Ordinance of 1787, and that it could not be supplanted by a later statutory enactment of the State of Ohio without an impairment of the obligations of a contract, it being argued that the Ordinance of 1787 was a compact between the original States and the people of the States in the said Territory and was unalterable except by common consent.

This court declared that the power of eminent domain is an inherent power of State Government without which it could not well perform its great functions, and that the constitutional inhibition upon any state law impairing the obligation of contracts is not a limitation upon the power of eminent domain. This court also stated that the obligation of a contract is not impaired when it is appropriated to a public use and compensation is made therefor. We agree with these propositions. We do not contend that the fact that the Petitioner had a contract for the sale of his property in any wise prevented the State or its agencies from the exercise of the power of eminent domain.

But this court also pointed out that when a contract is appropriated to a public use and compensation made therefor, the exercise of the power of emi-

nent domain neither challenges the validity of the contract nor impairs its obligation. Both the validity of the contract and the obligation of the contract are recognized, for it is appropriated as an existing enforceable contract. It is a taking of the contract and not an impairment of its obligation. This court further declared that if compensation be made, no constitutional right has been violated. With all of this we agree.

On the other hand this court also declared in the same case that the power of eminent domain residing in the States is untouched by any of the provisions of the Federal Constitution, provided there be due process of law, that is, a law authorizing it, and provision made for compensation. It is, therefore, clear that the exercise of the power of eminent domain does not impair the obligations of a contract when the validity of the obligations of the contract are recognized and compensated for, and it is equally clear that the exercise of the power of eminent domain is subject to the necessity for due process of law including the right to be fairly compensated.

In the City of Cincinnati v. Louisville and Nashville Railroad Company the land over which the elevated railroad was to be constructed was included in the grant by proprietors of land upon which the City of Cincinnati was originally laid out and was set apart "as a common for the use and benefit of the town forever." As to this dedication this court said at Page 399:

> "That the dedication in 1789, and acceptance by the then Town of Cincinnati constituted a con-

tract with the dedicators obligatory upon the Town and its successors, the City of Cincinnati."

In that case the action of the Railroad in seeking to condemn this land recognized a contract of dedication and sought the use of the court's machinery to determmine appropriate compensation.

Within the framework of the general principles enunciated by this court, that the taking recognized both the validity and the obligations of a contract, there was no impairment of the obligation of a contract. In the case at hand when the Petitioner came forward with his contract the court recognized neither the validity nor the obligation thereof. It excluded it from all consideration of the jury which had been impanelled to determine the value and it was required by the action of the trial judge to determine the value without any reference to the contract. What happened to this contract and the obligations created thereby in light of the taking of the Petitioner's land by the Respondent and in light of the action of the trial judge, affirmed as it has been by the highest court of the State? The contract was put aside by the trial judge. It could not be further operative because the exercise of the power of eminent domain by the Respondent had at one and the same time wiped out a part of the subject matter of this contract and prevented its ultimate fulfillment by the Petitioner.

We do not wish to be understood as arguing that the Respondent should have condemned the contract or provided the Petitioner any compensation for his contract. We do argue, however, that the existence of an obligation under that contract on

the part of the purchaser to pay $5,000 an acre for the land taken by the Respondent and for the land damaged by the Respondent as part of a tract of 400 acres to be assembled, affected the value of the Petitioner's land, and that, when the judicial proceeding was conducted, the purpose of which was to determine the value of that land, and the triers of the fact were not permitted to determine to what extent the value of the Petitioner's land had been enhanced by the existence of that contract and by what the Petitioner had done in fulfillment of the contract, the judicial action amounted to the passage of a law which impaired the obligations of the Petitioner's contract. Or in the alternative since no compensation was provided for the value which that contract added to the Petitioner's land, there was a taking, pro tanto, of his property without due process of law.

The Supreme Court of New Jersey in its Opinion states that "the Respondent did not intend to take over the Morgan contract or to appropriate to itself the benefits thereof." The fact is, that irrespective of the intention of he Respondent, the effect of the taking without compensating the Petitioner for the value which the contract added to his land amounted to a taking of his contract. The Supreme Court of New Jersey attempts to excuse the action of the Turnpike Authority and of the trial judge in the particulars complained of by saying that before the declaration of taking, Bowley had terminated his contract by returning the deposit. While this may be so, it was not done until it was obvious to the eye that the turnpike extension was going to go through his property and that the filing of a declaration of taking was only a formal matter.

The Supreme Court of New Jersey further argues that an owner of land may not contract for the sale thereof with knowledge of a proposed public improvement upon the express stipulation that performance will be excused if the lands are condemned, and then assert that the advent of the improvement constitutes an actual interference with it.

Again stating that the Supreme Court of New Jersey fell into error because what we are talking about is the added value to the Plaintiff's land by reason of the opportunity to create an assemblage of land and a promised price for that land if the assemblage was successfully effected, and the fact that the making of the improvement took land which would have had in all reasonable probability an added value if the improvement had not been made, certainly the right and opportunity of the land owner to make his property as valuable to himself as he possibly can, is a proper right which he has and one with which no government may interfere without compensating him fairly therefor. The argument of the Supreme Court of New Jersey amounts to a contention that because the Petitioner knew that the turnpike extension was being planned, he had no right to go forward with his plans for enhancing the value of his property. Certainly this cannot be so.

I.

There is appended hereto a copy of the Opinion of the Supreme Court of New Jersey.

J.

There is appended hereto a copy of the Judgment of the Supreme Court of New Jersey.

Petitioner respectfully prays for a writ of certiorari to issue to review the Judgment of the Supreme Court of New Jersey complained of, and he will ever pray.

JAMES M. DAVIS, JR.
Attorney of Petitioner
110 High Street
Mount Holly, N. J.

SUPREME COURT OF NEW JERSEY

No. A-139—September Term—

1957

NEW JERSEY TURNPIKE AUTHORITY,

Plaintiff-Respondent,

vs.

JOSEPH W. BOWLEY,

Defendant-Appellant.

OPINION

WEINTRAUB, C. J.

Filed
June 27, 1958
JOHN W. GILDEA
Clerk

SUPREME COURT OF NEW JERSEY

No. A-139 - September Term - 1957

NEW JERSEY TURNPIKE AUTHORITY,

Plaintiff-Respondent,

vs.

JOSEPH W. BOWLEY,

Defendant-Appellant.

Argued May 20, 1958. Decided

On appeal from the Superior Court, Law Division.

Mr. James M. Davis, Jr. argued the cause for Defendant-Appellant. Messrs. Powell and Davis, Attorneys.

Mr. Robert W. Criscuolo argued the cause for Plaintiff-Respondent. Messrs. Parker, McCay & Criscuolo, Attorneys. Mr. Robert W. Criscuolo, of Counsel.

The opinion of the Court was delivered by WEINTRAUB, C. J.

This is a condemnation case. Defendant Bowley appeals and tenders the question whether the trial court erred in excluding a contract of sale between him and one T. P. Morgan relating in part to the subject lands. We certified the matter on our own motion before consideration of it by the Appellate Division.

The declaration of taking was filed on September 19, 1955. For several years prior thereto, it was known that plaintiff planned to acquire a right of way for an extension to connect its turnpike with the Pennsylvania Turnpike. The alignment was officially declared on April 14, 1954.

The Morgan contract is dated April 10, 1953. The agreement provided that Morgan would pay Bowley $5,000 per acre for an assemblage of 400 acres provided Bowley could deliver title 60 days after the official declaration of the permanent alignment of the turnpike extension, the $2,000,000 purchase price to be paid in cash at that time. It expressly stipulated that if Bowley could not deliver "because of the alignment of the New Jersey Turnpike Extension the said Joseph Bowley will not be penalized or the said T. P. Morgan will not be bound by this agreement", in which event Morgan's deposit of $1,000 would be returned. According to Bowley, the deposit was made in the form of 10 bills of $100 denomination, and was returned in the same form some time after the declaration of the permanent alignment made it evident that 400 acres could not be assembled.

Bowley urges (1) that the contract should have been admitted as evidence of the value of the lands taken and damaged by the taking and (2) "There was an incidental taking of a contract along with

and as part of his land", for which compensation should be allowed.

The contract prescribed the area within which the 400 acres were to be assembled. Bowley points to 7 parcels therein, which he believes he could have acquired. They, together with his own holdings, totaled 496.12 acres. The turnpike right of way embraced 72.13 acres and hence if it should appreciably invade the area, there could be no assemblage of 400 acres. In fact the right of way as finally fixed roughly bisected the specified area.

That Bowley knew at the time of the Morgan contract (April 10, 1953) that the right of way would probably thus prevent an assemblage of 400 acres seems indisputable. On October 24, 1952, Bowley acquired two parcels constituting the Simpkins Farm. On the same day he conveyed the southerly portion of the farm to Markheim-Chalmers-Ludington, Inc. In his deed Bowley employed a description which made specific reference to the proposed southerly line of the turnpike extension and conveyed the lands south of that line. The parties simultaneously made a side agreement for an additional payment or refund, as the case might be, if the turnpike line as finally fixed should enlarge or reduce the total of 130.021 acres which the deed purported to convey. As matters developed, the final line approximated the one used in the deed and reduced the tract by 27.154 acres, which were reconveyed to Bowley on August 17, 1955, and became part of his holdings of 204.15 acres as of the date of declaration of taking.

There were multiple owners of some of the 7 parcels referred to above. At the time of the trial of this

case, one parcel was subject to an action to quiet title, the ultimate issue being adverse possession. Except for the acquisition of a tract of 45 acres (not contiguous to his own lands) on August 5, 1953, Bowley's efforts as of the date of declaration of permanent alignment (April 14, 1954) had yielded but one written agreement covering 11.04 acres. Nothing would be gained by recounting his testimony as to sundry conversations, negotiations and oral understandings. It is sufficient to say that the record is barren of evidence of the availability to Bowley of the required acreage. In fact the central theme of his testmony is that he was restrained from conclusive steps by uncertainty as to whether the right of way would render his efforts futile.

Morgan did not testify. There was no proof of his ability to perform. He was described by Bowley as a prominent Texas oil man and racetack figure.

Plaintiff points to circumstances suggesting that the contract was made in bad faith for the very use to which Bowley here sought to put it. But the ruling below did not rest upon such factual determination, and we here accept the premise that Morgan existed and wanted to acquire a tract of 400 acres.

I

The first question is whether the Morgan contract should have been admitted to evidence the value of the Bowley parcel.

Plaintiff took 45.35 acres of defendant's 204.15 acres. The major taking consisted of the right of way along the southerly line of the property. A strip running northerly from the right of way was also taken

for an access road, resulting roughly in an equal division of the remainder of defendant's tract.

The experts produced by both sides agreed that, although the lands were devoted to agriculture, their highest and best use was industrial. They differed as to whether that use was for heavy or light industry, but agreed that assemblage was an important factor. All of the experts found damage to the remaining lands by virtue of the taking. Plaintiff's experts valued the lands before taking at $3,000 per acre while defendant's experts placed the figure at $4,500 and $4,575.

Both parties accept the principle stated in *United States* v. Powelson, 319 U.S. 266, 275-76 (1943):

> "An owner of lands sought to be condemned is entitled to their 'market value fairly determined.' United States v. Miller, 317 US 369,374, ante, 336, 342, 63 S Ct 276 147 ALR 55. That value may reflect not only the use to which the property is presently devoted but also that use to which it may be readily converted. Mississippi & R. River Boom Co. v. Patterson, 98 US 403, 25 L ed 206; McCandless v. United States, 298 US 342, 80 L ed 1205; 56 S Ct 764. In that connection the value may be determined in light of the special or higher use of the land when combined with other parcels; it need not be measured merely by the use to which the land is or can be put as a separate tract. McGovern v. New York, 229 US 363, 57 L ed 1228, 33 S Ct 876, 46 LRA (NS) 391. But in order for that special adaptability to be considered, *there must be a reasonable probability of the lands in question being combined*

with other tracts for that purpose in the reasonably near future. Olson v. United States, 292 US 246, 255, 78 L ed 1236, 1244, 54 S Ct 704. *In absence of such a showing, the chance of their being united for that special use is regarded 'as too remote and speculative to have any legitimate effect upon the valuation.'* McGovern v. New York, supra (229 US p. 372, 57 L ed 1232, 33 S Ct. 876, 46 LRA (NS) (391)." (emphasis added.)

The question is whether the Morgan contract is evidential of the value of the Bowley tract under the approach there stated.

The trial court conducted a preliminary hearing in the absence of the jury to determine in the exercise of a sound discretion whether the proof was too remote and speculative for submission to the jury. *State v. Gorga*, 26 N. J. 113, 117 (1958); *Ringwood Co. v. North Jersey District Water Supply Commission*, 105 N. J. L. 165, 172 E. & A. (1928); 9 Wigmore, Evidence (3d ed. 1940), § 2550 p. 501. He found the offer to be inadequate, and we agree.

Proof of the sale of the subject property to the condemnee may be admissible under appropriate circumstances to evidence value. See *New Jersey Highway Authority v. Rudd*, 36 N. J. Super. 1 (App. Div. 1955). Here we have something less—a contract to sell.

Most jurisdictions reject proof of mere offers to purchase the condemned lands. *In re Port of New York Authority*, 28 N. J. Super. 575, 583 (App. Div. 1953); 4 *Nichols, Eminent Domain*, (3d ed. 1951, § 12.311 (2), pp. 54-55; 1 *Orgel, Valuation Under Eminent Domain*, (2d ed. 1953), § 148, p. 623; *Jahr, Emi-*

nent Domain (1953), § 145, p. 223; *annotation*, 7 *A.L.R.* 2d 781,785,823 (1949); *annotation*, 84 L. ed. 248 (1940). Several considerations differentiate the probative force of an offer from that of a consummated sale. Offers, especially oral ones, may be glibly made without serious intention or the required resources. The offeror is likely to be unavailable for examination as to his intentions, ability to perform, or unusual motivations for seeking the property. The area for collateral inquiry is far broader than in the case of actual sales, as is also the opportunity for collusion and fraud. For such reasons, the great weight of authority declines to accentuate the element of speculation which inevitably attends an inquiry into value. Even in jurisdictions where offers may be shown, proof would probably be required which is here lacking, at least in part. Thus in *City of Chicago vs. Harris-Halsted Building Corp.*, 11 Ill. 2d 431, 143 N.E. 2d 40 45 (Sup.Ct. 1957), the court laid down the test that the "offer must be made in good faith, by a man of good judgment, acquainted with the value of the real estate and of sufficient ability to pay" in "cash".

So also it has been held that an option (on comparable lands) not binding on the purchaser may not be proved. *In re Housing Authority of Newark*, 126 N. J. L. 60, 64, (E. & A. 1941). Plaintiff says the Morgan contract is no more than an option. But in form, at least, it purports to bind Bowley to acquire the acreage without reference to cost (Bowley testified it was a "gamble") and Morgan to buy at the stipulated price, subject to the escape clause relating to the permanent location of the right of way.

There seems to be little authority with respect to the admissibility of a binding contract when offered by the condemnee. *United States v. Certain Parcels of Land*, 144 F. 2d. 626 (3rd Cir. 1944); *annotation*, 155 A.L.R. 262, 265 (1945); 1 *Orgel, supra*, § 148, p. 627. We need not consider the competency of a firm, unconditional agreement since the insufficiency of the one here involved is patent. Morgan did not agree to pay $5,000 per acre for Bowley's property alone. He attached an extraordinary condition, to wit, the assemblage of 400 acres within a tightly prescribed area. He would pay the stipulated price only to one who successfully carried the burden and risk of tying together a substantial number of parcels in diverse ownerships. Performace was so beset with contingencies that upon the record here made it would have been sheer speculation for a jury to give it probative effect. *Cf. In re Morris & Cummings Dredging Co.*, 96 N.J.L. 248, 251 (E. & A. 1921). In the last analysis, the issue is whether the contract would reasonably show what a willing buyer would pay a willing seller for the Bowley acreage on the basis of a reasonable probability of its being combined with other tracts in the reasonably near future. The contract in no way discloses what Morgan would have paid for the Bowley lands alone on that basis and we fail to see how a jury could have been aided by it in the inquiry. Hence the trial court's ruling was correct.

II

As stated above, defendant here urges the contract should have been admitted (wholly apart from its evidential worth with respect to the value of the

Bowley lands) for the jury's determination of additional damages resulting from the deprivation of defendant's opportunity to perform the contract. He says the contract became "a feature of the land itself," which was incidentally taken "along with and as part of the land," without due process of law and in violation of Article I, § 10 of the Constitution of the United States prohibiting a state from impairing the obligation of contract.

Plaintiff seems correct in saying that the issue here pressed contradicts defendant's position at the trial. There defendant said "it is not my contention that simply because the contract goes into evidence, that the jury is to compensate Dr. Bowley for the loss of the contract." He added the contract "shows Dr. Bowley's plan, and intends (sic) to show the value of his lands as of 1953 as part of that plan" and that the extension "cut off his land from the opportunity that it had." At best, the position at the trial was obscure, but granted the scope now urged, it is without merit.

The power of eminent domain of course is not restrained by the existence of a contract of sale and the exercise of that power does not violate the constitutional guaranty against state action impairing the obligation of contract. *Cincinnati v. Louisville & Nashville Railroad Company*, 223 U. S. 390 (1912).

The question rather is whether there is a right of compensation for the loss of the contract. A distinction has been drawn in general terms between a case in which the condemnor acquires and takes over a contract and a case in which the taking of the property frustrates the performance of a contract, compensation being allowed in the former in-

stance and denied in the latter. 1 *Orgel, supra,* § 76, p. 330; *Jahr, supra* § 114, p. 157.

The Morgan contract in no sense became part of the land. It did not further any existing enjoyment or utilization of the land, nor was the land devoted to any activity which would result in the performance of the contract. *Cf. City of Trenton v. Lenzner,* 16 N. J. 465 (1954), *certiorari denied,* 348 U. S. 972 (1955). The land was a farm. The contract was nothing more than a personal right of Bowley, indistinguishable from the right which a stranger to the lands would have had if Morgan had contracted with that stranger for the acquisition and sale of the acreage. Hence we fail to discern how it can be said the contract was attached to the land and condemned with it.

Nor did plaintiff intend to take over the Morgan contract and to appropriate to itself the benefits of that contract. It had no desire to assemble and sell lands to Morgan; its purpose was to build a turnpike extension. In fact the contract was no longer in existence at the time of the declaration of taking, for Bowley had already terminated it by returning the deposit, and in any event the contract by its terms was then beyond performance.

Nor was there any proof as to the value of the contract or that anyone would have paid a farthing to take over what Bowley acknowledge to be a gamble.

If defendant's point is that the performance of the contract was frustrated and that damages should be paid for such interference, it would seem sufficient to state an obvious proposition. No one, be he the owner of the lands or not, may contract for their

sale with knowledge of a proposed public improvement upon the express stipulation that performance will be excused if the lands are condemned, and then assert that the advent of the very public improvement contemplated in the contract constitutes an actionable interference with it. Whatever may be the proper scope of the doctrine that the condemnor is not liable for the frustration of the performance of a contract, the agreement here involved easily falls within the doctrine.

The judgment is accordingly affirmed.

SUPREME COURT OF NEW JERSEY

Appeal Docket No. 2614

NEW JERSEY TURNPIKE AUTHORITY

Plaintiff-Respondent,

vs.

JOSEPH W. BOWLEY,

Defendant-Appellant.

CIVIL ACTION ON APPEAL

Mandate on Affirmance

This cause having been duly argued before this Court by Mr. James M. Davis, Jr., counsel for the appellant and Mr. Robert W. Criscuolo, counsel for the respondent, and the Court having considered the same,

It is hereupon ordered and adjudged that the judgment of the said Superior Court—Law Division is affirmed with costs; and it is further ordered that this mandate shall issue ten days hereafter, unless an application for rehearing shall have been granted or is pending, or unless otherwise ordered by this Court, and that the record be remitted to the Superior Court—Law Division to be there proceeded with in accordance with the rules and practice relating to that court, consistent with the opinion of this Court.

WITNESS the Honorable JOSEPH WEINTRAUB, Chief Justice, at Trenton on the twenty-seventh day of June, 1958.

JOHN H. GILDEA

Clerk of the Supreme Court

FILED
June 27, 1958
John H. Gildea
Clerk

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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1958.

No. 472

JOSEPH W. BOWLEY,

Petitioner,

vs.

NEW JERSEY TURNPIKE AUTHORITY,

Respondent.

ANSWER OF THE RESPONDENT, NEW JERSEY TURNPIKE AUTHORITY.

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I. F. Huntsinger Co., *Appellate Printers*, Camden, N. J.

TABLE OF CONTENTS

	PAGE
Counter Statement of the Case	3
Argument	8
Point I. The exclusion of the contract from evidence did not take petitioner's property or impair the obligation of his contract in violation of the Constitution of the United States	8
A. Since the contract was not appropriated or impaired by the taking, petitioner is entitled only to that compensation which is just compensation, having in view the highest and best use that might be made of it in the foreseeable future	8
B. Petitioner was not deprived of showing the highest and best use of his land by the exclusion of D-1, which if error, is not reversible error	11
Point II. The agreement of sale between Bowley and Morgan was properly excluded as evidence of the highest and best use of the Bowley property because there was no reasonable probability of performance in the reasonably near future	15
A. The evidence received by the Court showed no reasonable probability of fulfillment of the agreement	15
B. The agreement was in its essentials merely an offer and consequently no evidence of value	26
Conclusion	29

TABLE OF CITATIONS

CASES:

	PAGE
Apex Metal Stamping Co. vs. Alexander & Sawyer, Inc., 48 N. J. Super. 476, 483 (App. Div. 1958)	9
City of Chicago vs. Harrison Halstead Building Corporation, 143 N. E. 2d 40 (Ill. S. Ct. 1957)	27
City of Trenton vs. Lenzner, 116 N. J. 465, 476 (1954)	10
Cramwell vs. Clinton Realty Co., 67 N. J. Eq. 540 (Ch. 1904)	25
Crystal Lake Park District vs. Consumers Co., 313 Ill. 395, 404, 145 N. E. 215 (1924)	28
Currie vs. Waverly and Central Railroad Company, 52 N. J. L. 381 (E. & A. 1890)	26, 28
Earlin vs. Mors, 1 N. J. 336, 340 (1949)	25
Erceg vs. Fairbanks Exploration Co., 95 Fed. 2d 850 (9 C. C. A. 1938)	27
Grigg vs. Landis, 21 N. J. Eq. 494 (E. & A. 1870)	25
In re Port of New York Authority, 28 N. J. Super. 575, 583 (App. Div. 1953)	26, 27
Maccia vs. Tynes, 39 N. J. Super. 1, 11 (App. Div. 1956)	14
Matter of Simmons, 68 Misc. Rep. 65, 124 N. Y. S. 744 (1910)	28
McGovern vs. City of New York, 229 U. S. 372, 33 S. Ct. 876, 57 L. ed. 1228, 1232	10
Mullen Benevolent Corp. vs. U. S., 290 U. S. 89; 54 S. Ct. 38, 78 L. ed. 192	9
New Jersey Highway Authority vs. Rudd, 36 N. J. Super. 1, 5 (App. Div. 1955)	28
N. J. Highway Authority vs. Rue, 41 Super. 385, 388 (App. Div. 1956)	10

TABLE OF CONTENTS

PAGE

Omnia Commercial Co. vs. U. S., 261 U. S. 502, 43 S. Ct. 437; 67 L. ed. 773 9

Ottawa, etc., R. R. Co. vs. Adolph, 41 Kansas 600, 601, 21 P. 643 (1889) 28

Roberts Electric Inc. vs. Foundation & Excavations, Inc., 5 N. J. 426, 431 (1950) 9

Sharp vs. United States, 191 U. S. 341, 24 S. Ct. 114, 48 L. ed. 211 (1903) 27

State Highway Com'r vs. Burnett, 24 N. J. 280 (S. Ct. 1957) 13

Stamato vs. Agamie, 24 N. J. 309 (1957) 25

Suburban Land Co. vs. Arlington, 219 Mass. 539, 107 N. E. 432 (1914) 28

Sustick vs. Slatina, 48 N. J. Super. 134, 141 (App. Div. 1957) 9

U. S. ex rel. T. V. A. vs. Powelson, 319 U. S. 266, 282; 87 L. ed. 1391, 1401 10

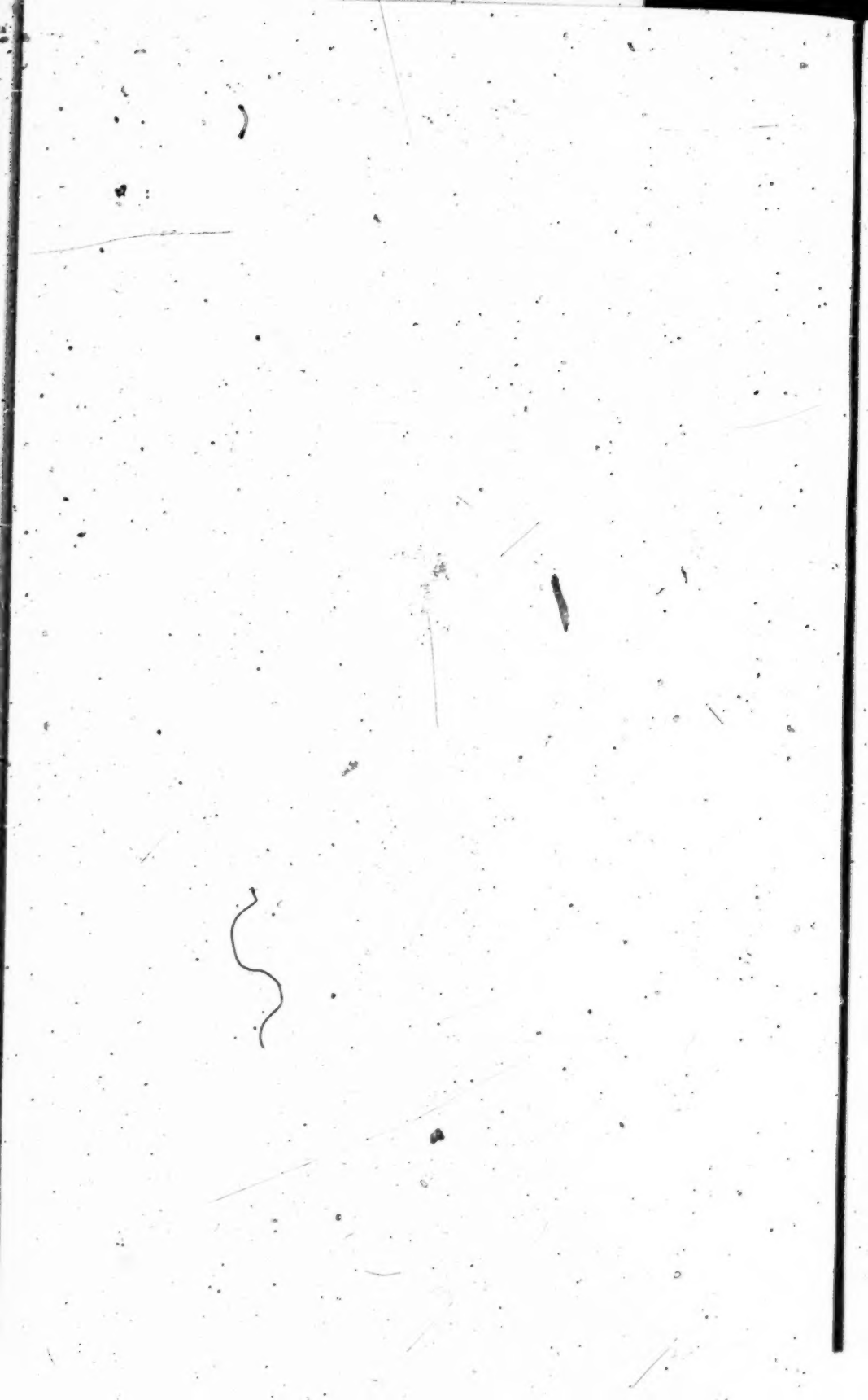
U. S. vs. Certain Parcels of Land, 144 F. 2nd 626 (3 C. C. A. 1944) 14, 26

TEXT:

155 A. L. R. 262 26

AUTHORITY:

Jahr, Eminent Domain, Section 137, p. 157 9



IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1958.

No.

JOSEPH W. BOWLEY,

Petitioner,

vs.

NEW JERSEY TURNPIKE AUTHORITY,

Respondent.

ANSWER OF THE RESPONDENT, NEW JERSEY TURNPIKE AUTHORITY.

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The answer of New Jersey Turnpike Authority, respondent, to the petition of Joseph W. Bowley, of the City and County of Burlington, State of New Jersey, respectfully shows:

A.

That the petitioner is not entitled to the issuance of a writ of certiorari to the Supreme Court of New Jersey which entered a judgment on the opinion of Mr. Chief Justice Weintraub, a copy of which is appended hereto and which is reported in 27 N. J. 549. (Advance Sheet No. 31 of August 15, 1958) and 143 A. 2nd 558 (Advance Sheet No. 3 of August 23rd, 1958).

B.

The respondent denies all allegations set forth in paragraph B in the petition, except those allegations appearing on page 5 of the petition which are admitted.

C.

The questions presented for review are whether a property owner, in a condemnation action, is deprived of property without due process of law in violation of the 14th Amendment to the Constitution of the United States or has the obligations of a contract impaired by the passing of a law in violation of Section 10, Article I of the Constitution of the United States when

A. his expert witnesses testified as to the value of the property taken and as to the highest and best use of that property but his offer into evidence of a contract for the sale as a unit of all of his property together with other property owned by strangers was rejected

B. and when after a full hearing, out of the presence of the jury, the court excluded such agreement of sale as be-

ing conditional, contingent, speculative and without any reasonable probability of performance in the reasonably near future.

D.

Respondent concedes the allegations of Part D of the petition.

E.

COUNTER STATEMENT OF THE CASE.

On September 19, 1955 the New Jersey Turnpike Authority filed a declaration of taking of a portion of the lands owned by defendant Bowley in Florence Township, Burlington County, New Jersey, lying between, but not contiguous to, the Delaware River and Route 130. An appeal was taken by him from the award of the condemnation commissioners. At the hearing of that appeal before a jury in the Burlington County Court the defendant had Exhibit D-1 (D713a) marked for identification. The court refused to admit it in evidence and this appeal, in effect, is from that ruling.

The exhibit is an agreement of sale dated April 10, 1953 between Bowley and one T. P. Morgan, who did not testify, and who allegedly agreed to pay Bowley $5,000 an acre for a minimum of 400 acres of ground to be assembled by him within an area bounded by Schuyler's Ferry Road, River Road, the boundary line of lands owned by Florence Pipe and Foundry Company and Cedar Lane. (See Map, D720a.) The lands of Florence Pipe, not marked on the map are the blank areas extending from the River to Cedar Lane con-

stituting the entire land at the top of the Map, north of the lands the map delineates. The down payment was $1,000. Settlement was to take place within sixty days after the New Jersey Turnpike Authority officially declared the alignment of its Pennsylvania extension. The latter event happened on April 14, 1954 (D647a-5 to 33) so that the date of settlement became June 13, 1954. The agreement further provided that if the defendant could not assemble the acreage because of the Turnpike alignment the down payment was to be returned and Bowley released.

Bowley obligated himself by the agreement, D-1 to sell the entire acreage set forth in two deeds recorded on October 24, 1952, in Book 1136, p. 269 and Book 1136, p. 267 respectively, known as the Simpkins Farms. They were all the lands he owned in the area of the proposed assemblage on that date. He had, however, already conveyed 130.021 acres of these lands to Markheim (Exhibit P-30, P11a) and had contracted to sell Markheim more if the final alignment of the Turnpike placed the southwesterly line of the right of way more northerly than it had been described in the deed to Markheim (Exhibit D-10, P1a). Counsel for Bowley stipulated that the Court could assume for the purposes of this case that neither Bowley nor Morgan could get "one square foot of land" from the Manor Real Estate Company (D427a-29).

Bowley knew prior to April 10, 1953, date of D-1 for identification, that his lands were to be severed by the Turnpike Extension, even though he did not know exactly where (D321a-20 to 27; D340a-1 to D341a-26). At the time Bowley acquired the Simpkins Farm he sold lands the same day to Markheim with reference to a proposed right of way to the Turnpike (Exhibit P-30, P11a) and entered into the agreement for an adjustment of acreage with Markheim to take place upon the Turnpike's final alignment (Exhibit D-10, P1a). He read this deed and agreement (D609a-14); he

understood what they said (D609a-18); and he saw the map made by Wills for Markheim from which the description was prepared (D609a-24 to 40) and which showed the Turnpike alignment. All of this occurred in October, 1952, long before the agreement of sale was executed. He knew at the time the Turnpike was going somewhere on his property (D341a-3 to 14). The Exhibit D-13 from Sutton to Bowley (D711a), undated but carrying a settlement date of October 1, 1955 which he testified extended agreements going back as far as 1952 (D608a-5 to 33) is additional proof that he knew of the Turnpike alignment when he entered into the agreement D-1 to perform what he should then have known was an impossibility. This general base line for the location of the Turnpike was never changed (D628a-12, 13).

Defendant made formal proof of the execution of the agreement and then offered it in evidence to prove the value of the lands (D416a-15 to 16); their adaptability for use as a portion of an assemblage of lands (D425a-20 to 25); the plan of defendant to make such an assemblage; the value of the lands in 1953 as part of that plan and the frustration of the plan by the Turnpike (D428a-28 to 34). Defendant expressly stated that the purpose of the offer was not to seek compensation for the loss of the contract (D428a-23 to 26), but contended the Turnpike's action would impair the contract (D416a-3 to 11). Plaintiff objected to the offer on the ground that the contract and the assemblage were speculative and not reasonably probable of fulfillment in the near future (D414a-22 to D415a-38).

At that stage of the proceeding the proofs then in evidence showed that defendant Bowley had initially acquired title to his lands on October 24, 1952 by two deeds, conveying a tract known as the "Simpkins Farm". On the same day, by Exhibit P-30 (P11a), he conveyed to Markheim-Chalmers-Ludington, Inc. all the portion of the lands he

had just acquired; lying to the southwest of the proposed southwesterly line of the Turnpike extension, which line is the most northerly line outlined in red on Exhibit P-54 (P15a) bearing the names "Markheim-Chalmers and Ludington" along the westerly end.

This conveyance transferred 130.021 acres but on the same day the parties, recognizing that the Turnpike alignment was not final, by Exhibit D-10 (P1a) agreed to an adjustment in price if the shift in the alignment chosen as a boundary resulted in encompassing more or less than 130.021 acres in the grant to Markheim.

This agreement was fulfilled on August 17, 1955 by the reconveyance to Bowley of the portions north of the final Turnpike Alignment (Exhibit D-12, P3a), so that on the day of taking Bowley owned a total of 204.15 acres (D5a-5).

The agreement D-1 had specifically mentioned that the lands to be delivered under it might include the "Marter" tract which lay within the area the agreement outlined. On August 5, 1953 Bowley acquired the Marter tract of 45 acres (D69a-6 to 11) and on May 27, 1955 conveyed it, not to Morgan, but to Markheim (D342a-1 to 4).

Experts had testified on both sides that the highest and best use of the land was for light industry (D24a-28) or heavy industry (D484a-18), and that industry required minimum assemblages of 100 acres each.

There was evidence of the surroundings of the Bowley tract and the value of industrial assemblages in the vicinity and the prices paid for lands acquired for such assemblages and prices for which assembled tracts sold, treated in detail under Section G, Point I (a) of this brief. Specifically, during the years 1951 and 1952, the Manor Real Estate Company, a wholly owned subsidiary of the Pennsylvania Railroad Company, made an assemblage southwest of the proposed line of the New Jersey Turnpike consisting of 958.449 acres at an average cost of $1,190 per acre (D136a-33

to 38). In making their assemblage they also acquired approximately 2719.02 feet of river frontage on the Delaware River. Before sale or lease the Pennsylvania Railroad Company constructed a spur to service the Manor assemblage, 10,400 feet in length (D139a-19, 22; D224a-21).

The Manor Real Estate Company thereafter transferred two pieces of its assemblage by a sale to the National Gypsum Company and a lease with option to buy with the Barium Steel Corporation. The sale to National Gypsum Company was on the basis of $3,500 per acre (D137a-33), which included 872.87 feet of water frontage (D138a-32). The cost per acre to Barium under the first option of the agreement is $2,606 per acre if purchased within one year of its effective date; and the second option is $2,875 per acre if purchased within three years of its effective date, for the first 500 acres, and an option of $2,350 per acre in the event they desire to take the remainder of the assemblage consisting of 361 acres (Exhibit P-42, D714a). The Bowley land had no railroad service or river frontage (D196a-28 to 40).

With the proofs in this posture and with the offer and objection before him the Court decided to take proof out of the hearing of the jury to assist him in determining the admissibility of the agreement D-1 (D587a-39 to D588a-27), and that testimony is summarized in respondent's argument hereinafter set forth.

ARGUMENT.

Point I.

The exclusion of the contract from evidence did not take petitioner's property or impair the obligation of his contract in violation of the Constitution of the United States.

A.

Since the contract was not appropriated or impaired by the taking, petitioner is entitled only to that compensation which is just compensation, having in view the highest and best use that might be made of it in the foreseeable future.

The claim of petitioner, under point C, Page 6, that exclusion of the contract from evidence constituted a taking of it or an impairment of its obligation is somewhat at variance with his statement to the trial court at the time it was offered. He then said:

> "Now, we must remember this, that it is not my contention that simply because the contract goes into evidence, that the jury is to compensate Dr. Bowley for the loss of the contract. That is not my theory at all" (D428a-28).

Consequently, there having been no offer to show a taking or impairment of the contract, but merely mention of it in the course of argument the trial court had no chance to rule on this point and, to the contrary, was told that such was not the issue.

The general rule is that matters not placed in issue at the trial, including Constitutional questions, with the exception of matters of jurisdiction or public policy, will not be considered on appeal. *Roberts Electric Inc. vs. Foundation & Excavations, Inc.*, 5 N. J. 426, 431 (1950); *Sustick vs. Slatina*, 48 N. J. Super. 134, 141 (App. Div. 1957); *Apex Metal Stamping Co. vs. Alexander & Sawyer, Inc.*, 48 N. J. Super. 476, 483 (App. Div. 1958). At least the issue was not clear cut.

Text writers and courts alike recognize that there is a distinction between the "frustration" of a contract by reason of exercise of the sovereign power and an appropriation or impairment of the contract. Just compensation is only required if the taking falls into the second group. The principles to be derived from reported decisions on this point are summarized in the following excerpt from *Jahr, Eminent Domain*, Section 117, p. 157:

> "It frequently occurs that the taking of private property results in the owner's inability to perform certain profitable contracts for which the owner suffers a loss or damage. While the general rule is that no compensation is paid for such losses, there are cases in which the owner is held to be entitled to an award for such damage. These cases usually fall into two groups."
>
> "In the first group the taker does not acquire the outstanding contract but merely the property which has the effect of rendering performance impossible. The contract there is said to be frustrated by an act of the state. The contract is not being taken, hence there can be no compensation." (Citing *Omnia Commercial Co. vs. U. S.*, 261 U. S. 502, 43 S. Ct. 437; 67 L. ed. 773; *Mullen Benevolent Corp. vs. U. S.*, 290 U. S. 89; 54 S. Ct. 38, 78 L. ed. 192.)
>
> "The second group comprises those cases where the

taker acquires the property as well as the right to the performance of the contract in which event there is a taking and compensation must be provided."

The effect here, insofar as it interfered with performance of the contract was a "frustration", and falls within the first group described in the quotation. Our Courts, Federal and State, have recognized and applied the rule. *U. S. ex rel. T. V. A. vs. Powelson*, 319 U. S. 266, 282; 87 L. ed. 1391, 1401; *City of Trenton vs. Lenzner*, 16 N. J. 465, 476 (1954); *N. J. Highway Authority vs. Rue*, 41 Super. 385, 388 (App. Div. 1956).

Cincinnati vs. Louisville & Nashville Railroad Company cited by defendant at page 16, line 9, dealt with the taking of a contract, not frustration of a contract and is not in point. Every taking interferes with uses to which lands may be put even where the taking may make impossible performance of contracts requiring the lands to carry out the contract. When the contract or use is not speculative it is considered in determining market value and compensation made. *N. J. Highway Authority vs. Rue*, 41 N. J. Super. 385, 387 (App. Div. 1956), involved the taking of land and makes a distinction between cases in which the frustration of a business can be considered as an element of damages and cases where it cannot and makes the turning point of the distinction the speculative or non-speculative nature of the business. See also *City of Trenton vs. Lenzner*, 16 N. J. 465, 476. In many cases set out in that opinion the injury to the business damaged contracts made in connection with the business. See also *McGovern vs. City of New York*, 229 U. S. 372; 33 S. Ct. 876, 57 L. ed. 1228, 1232.

In the case at bar since the contract itself was not appropriated to the public use, the only compensation that the constitution required be made to prevent the condemna-

tion constituting a taking or impairment of the contract was just compensation for the land having in view the highest and best use that might be made of it in the foreseeable future.

B.

Petitioner was not deprived of showing the highest and best use of his land by the exclusion of D-1, which if error, is not reversible error.

The refusal to admit D-1 (D713a) in evidence did not deprive petitioner of the opportunity to show the highest and best use of his land. If the highest and best use that could be made of the land was as a constituent part of a specific assemblage of 400 acres within definite boundaries accomplished by a day certain, for the purpose of sale to T. P. Morgan at $5,000 an acre as D-1 provides, then defendant was certainly, and properly, deprived of the chance to show the highest and best use.

If, however, as his experts testified, the highest and best use was as an assemblage for industrial use, then the record refutes his contention for it is replete with testimony that such was its best use, that assemblages of that type had been successfully made adjoining his parcel and successfully sold; that prior to the condemnation of his land was large enough to fulfill such a use and after its division by the Turnpike the resulting parcels were too small to satisfy the requirements of industry. This testimony is augmented with recitals of prices paid to effect such an assemblage and examples of recent sales of such assembled ground and the price at which assemblages sold, which, in most cases exceeded the price set out in D-1. The importance to the success of such an enterprise of river front ownership and

railroad access and the feasibility of obtaining both were disclosed to the jury. The demand for such acreage was detailed by both sides.

The specific testimony on these points appear as follows: The highest and best use is as a site for industry (D196a-23 to D197a-10; D205a-2 and 3; D366a-12; D484a-18 to D485a-8); assembled ground has a greater value for this use than isolated parcels (D267a-12 to 21) and the minimum assemblage acceptable to industry is 100 acres (D250a-22 to 25); the Bowley tract was large enough for industrial use before being divided by the Turnpike extension (D484a-26 to D485a-8). The possibility of assembling it with other ground, now separated from it by the Turnpike, existed before the taking (D285a-11 to 31) and this possibility included making an assemblage that would give the river frontage so important to industrial development (D526a-37 to D527a-24). The prices paid for lands for industrial assemblages adjoining the Bowley tract were given in detail (D95a-11 to D136a-38), as well as the prices at which it sold (D136a-39 to D137a-35; D499a-24 to D519a). Specifically, to refer to just one expert, those prices were: 68 acres sold at $7,801 per acre (D500a-25 to 29); 15.85 acres at $13,678 an acre (D505a-22 to 25) and some at $5,100 an acre (D514a-12). All experts agreed that there was a demand for such property (D265a-12 to 15; D483a-17 to D485a-6). Considering all of these elements one of the defendant's experts stated that in his opinion the value of the land taken was $4,575 per acre and damage to the remainder was $2,745 per acre (D529a-12 and 20).

It cannot be said therefore that defendant was deprived of the opportunity to show the highest and best use of his land, if that use was, as all experts agreed, for industry and enhanced in value if assembled with other lands. Indirectly, he was not even deprived of placing before the jury the very agreement D-1 as a basis for an opinion as to its

effect on the value of the lands when devoted to industrial use. Asked if it would have made any difference in his opinion if he had known of the particulars of D-1, which were first detailed to him the witness said he knew of the agreement and said it would not alter his opinion of the market value (D287a-7 to 14; D293a-22 to D294a-13).

Since all the experts testified that the highest and best use of the petitioner's land was for industry, and since the petitioner's own expert witness testified that having knowledge of the agreement it would not alter his opinion of the market value of petitioner's land, it would seem to follow that the price of $5,000 per acre which the petitioner seeks to present before the jury is a unique price reflecting that price which a unique buyer would pay. The record indicates the price is more than $400 per acre in excess of the market value testified by the petitioner's own experts if the land were used for its highest and best use, and as such the contract should not be admissible since as stated in the preceding point, the respondent is not acquiring the right to the performance of the contract. It is axiomatic that the price a unique buyer is willing to pay does not come within the definition of "just compensation", it is not ". . . a sum of money which fairly represents the transferable value of the property in the market place." *State Highway Com'r vs. Burnett*, 24 N. J. 280 (S. Ct. 1957).

An isolated bit of evidence is a premise which in combination with other premises leads to a conclusion; it is part of a syllogism. It is an axiom of the science of logic, as true today as it was in the time of Aristotle, that a conclusion can rise no higher than the premises from which it is derived. The conclusion sought in this case was that the market value of the Bowley tract on the day of taking was the value derived from its highest and best use; an assemblage for industrial purposes. If the conclusion can be barred from evidence when its attainment is purely speculative,

then certainly the evidence infected with that fault can be barred so that the conclusion will not be tainted with speculation. And so it was competent for the Court to take testimony and finding the agreement to be speculative and probability of performance in the near future lacking, to refuse to admit it as evidence tending to corroborate the experts' opinion. That there was evidence to show its speculative nature is developed under the succeeding point.

But if it be assumed for the moment that the agreement was not speculative and that the Court erred, still in view of the mass of other evidence before the jury in proof of this concept of the highest and best use of the land, the exclusion would not be prejudicial if the purpose of the offer was to show value as an industrial assemblage. See *U. S. vs. Certain Parcels of Land*, 144 F. 2nd 626 (3 C. C. A. 1944) where the Court stated that Pennsylvania excludes evidence of sale of the very property condemned and that "market value" in this type of case depends upon the judgment of the community rather than of a particular buyer and seller. Viewed in the light of the evidence detailed above the agreement could not have had a substantial influence on the verdict since it was not only merely corroborative of what the jury had been told, but in fact diluted what they had been told, for in demanding that the assemblage be made in a more limited area and time than the other evidence showed was required, it imposed harsher restrictions on the realization of the use than the experts considered necessary.

Exclusion of merely cumulative evidence of this nature cannot be said to have been "inconsistent with substantial justice", *Maccia vs. Tynes*, 39 N. J. Super. 1, 11 (App. Div. 1956).

Point II.

The agreement of sale between Bowley and Morgan was properly excluded as evidence of the highest and best use of the Bowley property because there was no reasonable probability of performance in the reasonably near future.

A.

The evidence received by the Court showed no reasonable probability of fulfillment of the agreement.

There was ample evidence from which the judge could reasonably conclude that the Bowley-Morgan agreement of April 10, 1953, Exhibit D-1 for identification could not, within reasonable probabilities, have been fulfilled. The evidence submitted on this question appears at D587a-29 to D616a-39; from D617a-30 to D668a-4.

It was apparent that Bowley could not perform his agreement from the outset. Bowley obligated himself by the agreement D-1 to sell the entire acreage set forth in two deeds recorded on October 24, 1952, in Book 1136, p. 269, and Book 1136, p. 267 respectively, known as the Simpkins Farms. They were all the lands he owned in the area of the proposed assemblage on that date. He had, however, already conveyed 130.021 acres of these lands to Markheim (Exhibit P-30, P11a) and had contracted to sell Markheim more if the final alignment of the Turnpike placed the southwesterly line of the right of way more northerly than it had been described in the deed to Markheim (Exhibit D-10, P1a). Counsel for Bowley stipulated that the Court could assume for the purposes of this case that neither Bowley nor Morgan could get "one square foot of land" from

the Manor Real Estate Company (D427a-29). It is therefore quite evident that from the very outset Bowley could not deliver the full acreage of the Simpkins Farms as he had agreed to do. Nothing in the record indicates whether the grantee was aware of this or whether he would waive his right to insist that Bowley deliver all of the Simpkins Farms which the agreement specified was to be part of the assemblage. While it may be argued that a proper interpretation of the agreement would construe it to mean that only that part of the Simpkins Tract north of the Turnpike was intended, Morgan was not present or a party to the suit and not only might insist that his bargain included all of the Simpkins Farms but also that the agreement meant that he was to receive 400 acres in addition to the farm and the agreement is so worded as to invite that construction for the assemblage is mentioned separately from the farm conveyance. These ambiguities could not be resolved without affording Morgan a hearing and he was neither a party nor present (D610a-18 to 21).

Bowley knew prior to April 10, 1953, date of D-1 for identification, that his lands were to be severed by the Turnpike Extension, even though he did not know exactly where (D321a-20 to 27; D340a-1 to D341a-26). At that time Bowley acquired the Simpkins Farm he sold lands the same day to Markheim with reference to a proposed right of way to the Turnpike (Exhibit P-30, P11a) and entered into the agreement for an adjustment of acreage with Markheim to take place upon the Turnpike's final alignment (Exhibit D-10, P1a). He read this deed and agreement (D609a-14); he understood what they said (D609a-18), and he saw the map made by Wills for Markheim from which the description was prepared (D609a-24 to 40) and which showed the Turnpike alignment. All of this occurred in October, 1952, long before the agreement of sale was executed. He knew at the time the Turnpike was going somewhere on his prop-

erty (D341a-3 to 14). The Exhibit D-13 from Sutton to Bowley (D711a), undated but carrying a settlement date of October 1, 1955 which he testified extended agreements going back as far as 1952 (D608a-6 to 33) is additional proof that he knew of the Turnpike alignment when he entered into the agreement D-1 to perform what he should then have known was an impossibility. This general base line for the location of the Turnpike was never changed (D628a-12, 13).

With Bowley's keen interest in everything pertaining to the Turnpike, it is hard to believe that he did not know where it was to be located until September 1955.

Any severance of his property by the alignment of the Turnpike, even near the southern boundary, made it improbable, if not impossible, to create an assemblage that would conform to the requirements of the agreement. Nonetheless, all the way Bowley sought and wanted the alignment of the Turnpike to the north along the line of lands of the Florence Foundry (D660a-13-14). If the Turnpike was so located, Bowley by the terms of Exhibit D-10, would have been obligated to sell most of the remainder of his lands to Markheim and thereby further reduce his chances of creating the assemblage. Such activity scarcely accords with a bona fide attempt to increase his holdings.

The agreement provided that the assemblage of 400 acres must be within the bounds of Schuyler's Ferry Road, River Road, Florence Pipe & Foundry property line, and Cedar Lane. All such acreage available, in tabular form, show the total to be 518.20 acres.

Bowley property at time of taking	204.15
Bauer property	28.82
Sutton Estate	145.78
Scott	12.21
Hays	33.87
Laumaster & Wright	21.29
Hull	5.00
Hydraulic Fill (outside agreement limits)	22.08
Marter	45.00
	518.20

This acreage includes all the lands within the limited area prescribed in the contract except the lands conveyed to Markheim or Manor, which admittedly they could not get (D427a-29 to 35). In fact, the 22.08 acres designated above as Hydraulic Fill lands were outside River Road and therefore not within the prescribed limits and could not be used to fulfill the contract.

It should also be noted that of the 204.15 acres held by Bowley at the time of the taking, he only acquired title to 27.154 acres on August 19, 1955 (Exhibit D-12, P3a). Deduct these and Hydraulic Fill 22.08, total 49.234, from the above total of 518.20 and irrespective of the final alignment of the Turnpike the available acreage would be 468.966. Reference to the Map (D720a) shows that counting the acreage embraced only within the larger parcels lying within the Turnpike main right of way a total of 72.13 acres would be taken by the road no matter where it was placed and since it was straight and the lands it bisected irregular in boundary more acreage necessarily would be isolated to the south no matter where it was located. It is clear therefore that with this amount of available acreage any severance of the Bowley lands or the lands within the assemblage area, no matter where it was, resulted in making

Bowley's performance under the contract impossible, a fact we have shown above, he knew before the agreement was made.

We have listed his testimony as it relates to each of the parcels that were available in the order of their appearance in the table of such lands set out above.

Bauer Property (28.82 acres)

This parcel was owned by four persons: Wilmer Bauer, his wife, Alice; Walter W. Bauer and his wife Anna (D615a-12 to 15). Wilmer purported, although none was clearly, to represent all the owners (D615a-21 to 35). There were "conversations" between him and Dr. Bowley, initiated by Wilmer (D615a-38). These "conversations" extended from 1953 to 1955 (D597a-36, 37). They never reached any written agreement (D616a-1, 2) and, indeed, the record doesn't indicate they even reached a verbal agreement or were ever close to it or that any price was discussed or that the three other owners subscribed to Wilmer's representation of them.

Sutton Estate (145.78 acres)

Because of its size, this was one of the most important parcels, although the failure to acquire any of the parcels would have been fatal to the scheme. Presumably this tract was owned by Ernest Sutton, his wife and sister, but Bowley's conversations were only with Ernest (D594a-24 to 31). These discussions started in 1953, two months before the Morgan agreement D-1 and continued on and on (D595a-13 to D596a-11). No agreement was ever reached except Exhibit D-13 (D711a) which was an extension of a prior agree-

ment or agreements which could have gone back as far as 1952-1953 (D608a). This agreement obviously was prepared from a map conforming to the ultimate location of the New Jersey Turnpike. (See Strip Map Exhibit D720a). Tract #1 in the agreement describes Parcel 5A, Tract #2 is composed of Parcel 5B, Tract #3 is Parcel 5C, and Tract #4 appears to be the part marked A. R. L. S. on the north side of the Turnpike right of way. It is a contract for the sale of the lands to be taken by the Turnpike from Sutton plus the A. R. L. S. piece, which would be land-locked on the northside of the Turnpike. This agreement could not possibly be in furtherance of a plan to create an assemblage.

A careful study of Exhibit D-13 and the strip map is also illuminating in connection with Bowley's claim that he had no knowledge of the alignment of the Turnpike Extension until the formal taking, particularly in view of his testimony that Exhibit D-13 was an extension of prior agreements. Bowley's uncertainty with respect to the origin of the description is equally enlightening (D607a-1 to D610a-11).

Defendant, to further support his position produced Exhibit D-14A for identification, an assignment by Sutton heirs to Bowley of their rights to acquire lands below high water mark adjoining the Sutton Estate, which assignment was acknowledged May 25, 1955 (D589a); Exhibit D-14D for identification, right of way agreement with Sutton Estate dated June 2, 1955; Exhibit D-14E for identification, letter from the Department of Conservation and Development dated June 14, 1957. These transactions not only took place a year or more after the agreed settlement date of the Morgan agreement, but referred to lands that were beyond the outbounds of the area to which the assemblage was limited.

Consequently, his efforts of two years with respect to this tract of 145.78 acres, so important to his plan had produced an agreement of sale, agreeing to sell a total of only 11.04 acres (Exhibit D-13; D711a), described according to the

Turnpike map and shown to be lands either to be taken by the Turnpike or to lie to the north and apart from the assemblage he wanted to make.

Scott (12.21 acres)

The Scott property appears to have been owned by a Nancy and Helen Scott but Nancy was dead and defendant conversed with a woman he believed to be her daughter, presumably over the same period covered by the Sutton discussions, and also to an attorney apparently representing some or all of the Scotts. An agreement of sale (Ex. D-18, D711a) was prepared but never signed (D596a-30 to D587a-29). Even Bowley did not sign it (D604a-9) nor make a down payment (D603a-38).

This agreement (Ex. D-18, D711a) was dated "1955" but settlement was not to be until January 25, 1956 long after the time for performance of D-1 (June 13, 1954) had passed.

Hays (33.87 acres) and *Laumeister & Wright* (21.29 acres)

The Hays heirs claimed title by adverse possession to the Laumeister & Wright tract and a suit to quiet title was still pending at the time of the hearing. Insofar as that 21.29 acres is concerned, the relevancy of his arrangements with the Hays heirs to the probability of acquiring that acreage depended on the outcome of the suit (D642a-1 to 5).

The Hays parcel of 33.87 acres was owned by nine heirs (D642a-7 to 9). Seven of the nine were represented by Powell & Davis, one by Henry Hartman, Esq., and one by John S. Conroy, Esq. and the heirs all desired to sell the property (D642a-12 to 19).

Bowley had negotiated for the property from about 1952,

or prior to the Morgan agreement, down to September 19, 1955 and the date of taking, a period of three years (D599a-30 to D602a-16). General Powell's records indicated that Bowley conferred with him presumably the first time on October 29, 1954, with respect to the Hays Estate, as this is the earliest record of any conversations in his files. On January 25, 1955, General Powell wrote all the heirs, or their attorney, advising that Bowley had offered $75,000 for the Hays property. His records also showed that on January 31, 1955, he gave Bowley a receipt for $7500; and that Anna Rainier on that date acknowledged receipt of General Powell's letter of January 25, 1955, and accepted as far as she was concerned the Bowley offer. As of the time of trial only one acceptance was received from the seven heirs represented by General Powell. (D643a-30 to D644a-5). Apparently no acceptance was received from John S. Conroy, 3rd, Esquire, for his client Johnson; and Bowley admittedly was having trouble with the ninth heir, Lambert Rainier (D613a-25).

Here, again a written contract was prepared on December 15, 1954 but executed by no one (D711a; Ex. D-17).

Hull (5 acres)

Dr. Bowley testified that he had an "understanding" with these people for the purchase of their 5 acres (D598a-36 to D599a-1) but no written contract (D606a-2 to 9).

Hydraulic Fill (22.08 acres)

This property was not within the bounds prescribed by the agreement and could constitute no part of the assemblage.

Marter (45 acres)

This piece is shaped like an inverted pan, located south of the Sutton tract and north of Schuyler's Ferry Road (Map P-45, D719a), separated from the rest of the potential assemblage by the Markheim tract and the Cucinotta piece owned by Markheim (D342a-10 to 30, D344a-34 to 35). Markheim land could not be acquired. Its utility to the assemblage depended therefore upon the possibility of first acquiring the Sutton tract, detailed above. Bowley bought on August 5, 1953 and sold it to Markheim May 27, 1955, before the taking (D342a-1 to 4). From the fact that the portion of the Simpkins tract consisting of 130 acres sold to Markheim by Bowley before the agreement was executed and described as lying south of the proposed Turnpike in that deed (Ex. D-30), is farther north than the Marter tract, as Exhibit at D720a indicates, it is apparent that Bowley knew it could not form part of his assemblage before the agreement D-1 was entered into.

The execution of the agreement itself was rather unusual. The witness and typist was Bowley's sister (D411a-29). She had come all the way from Wilmington, Delaware in response to a telephone call from him (D412a-22). She had not known of the purpose of her visit until she arrived (D412a-32); she prepared the agreement at Bowley's instruction in his office (D412a-1), attested it and immediately returned to Wilmington (D412a-20).

The purchaser, T. P. Morgan, was not produced at the hearing (D610a-13 to 28). Consequently, other than the statements by Dr. Bowley that the purchaser was a nationally known racing figure (D610a-8 to D611a-6) and that he "knew his sources" in answer to the question as to whether or not he had made an investigation to see whether the purchaser could raise the $2,000,000 required to conclude the transaction (D611a-34 to D612a-5) there was no testimony

that Morgan could have fulfilled his agreement and no opportunity by plaintiff to cross-examine him as to his motives for entering into the agreement or the considerations involved in setting the price.

The down payment was a strictly cash transaction (D612a-6 to 21) and Dr. Bowley had no records of the transaction because he kept no records (D612a-37 to D614a-13).

Following the testimony last referred to, Dr. Bowley, who was certainly the one best able to know whether or not his transaction was speculative, characterized it as "a gamble". In view of his characterization of himself at that point as a "horse man" it may be assumed that he used the term as a term of art. The court felt the same way about the transaction and based on the foregoing testimony regarded it as speculative and within the rule of the cases cited above banning evidence of future uses which are not within the realm of probability (D614a-11 to 19).

Further evidence that the agreement was not competent proof of the fair market value of Dr. Bowley's land on the day of the taking appears at D663a-31 to D664a-4. He states that the Sutton tract was a "squeeze deal". Suttons wanted $7500 an acre, he was willing to go as high as $8,000 to $10,000 in order to secure the acreage for the assemblage. This tract of 145 acres was the second largest tract involved and was absolutely essential to complete the assemblage. It is clear that he had to pay the price he was willing to pay for lands to be sold at one-half that price, the value of the lands he already had would be materially reduced.

Contrasting the price reserved in the agreement with the price of $3500 Manor Real Estate Company had received from National Gypsum for an acre of ground with 872.87 feet of water frontage (D138a-32) and the price reserved in the lease with Barium Steel Corporation ranging from $2350 to $2875 an acre for lands with 1845.15 feet of water frontage, both of which tracts were served by a railroad spur that

the Manor Real Estate Company had been required to construct at a cost of $14.50 a lineal foot for 10,400 feet, it is apparent that the price set out in the Bowley agreement was not realistic.

While the printed words making time of the essence in the agreement D-1 have been lined out, the Courts have held that, at law, time is of the essence of a contract for the sale of lands. *Earlin vs. Mors*, 1 N. J. 336, 340 (1949). Even in Chancery time may be of the essence because of the nature of the transaction. *Grigg vs. Landis*, 21 N. J. Eq. 494 (E. & A. 1870); *Cramwell vs. Clinton Realty Co.*, 67 N. J. Eq. 540 (Ch. 1904). The time for performance of this contract had elapsed long before the Turnpike taking, and in view of the foregoing rules the contract itself may have become void, a circumstance increasing its speculative nature.

Attention is directed to *Stamato vs. Agamie*, 24 N. J. 309 (1957). Specific performance was asked in that case of an agreement of sale contingent upon seller's acquisition of other lands and their rezoning. The memorandum did not state that time was of the essence, but the Court held:

> "And where the obligation in the contract is essentially unilateral, as here, in the sense that plaintiff had an escape if the property should not be rezoned or if he should fail to acquire the acreage of the third person, delay is viewed with special strictness. *Meidling vs. Trefz*, supra (48 N. J. Eq., at page 643); *Moran vs. Fifteenth Ward B. & L. Assn.*, 131 N. J. Eq. 361, 363 (Ch. 1942); *Fry, Specific Performance* (6th ed. 1921), Section 1103, p. 515; *Pomeroy, Specific Performance* (3rd ed. 1926), Section 387-8, p. 821. It would be unreasonable to find that the party who alone is fully committed agreed to be bound interminably, and hence in these circumstances the agreed time limitations are more meaningful than in situations in which the obligations

are bilaterally firm. Especially is this true when there is absent any element of forfeiture of a partial performance. Cf. 3 Corbin, Contracts (1951), Section 714, p. 800."

In the light of all the testimony that was taken, the least that can be said is that there was certainly evidence from which a reasonable man could conclude that the contract was speculative and not probable of fulfillment in the near future.

B.

The agreement was in its essentials merely an offer and consequently no evidence of value.

Attention is directed to the cases collected in 155 A. L. R. 262 following the report of *United States vs. Certain Parcels of Land*, at page 253 (144 Fed. 2d 626, 3 C. C. A. 1944). While these cases for the most part regard an agreement of sale for the identical land involved in the condemnation, unconsummated on the day of taking as evidence admissible on the question of value they are clearly distinguishable from the contract that was offered in the case at bar. Our Courts have consistently refused to permit a condemnation defendant to give evidence of offers or options received for the purchase of his land. The authorities are set out in the case of *In re Port of New York Authority*, 28 N. J. Super. 575, 583 (App. Div. 1953).

Petitioner cites *Currie vs. Waverly and Central Railroad Company*, 52 N. J. L. 381 (E. & A. 1890), in support of its argument that the enhanced market value of petitioner's land due to its adaptability for valuable purposes in connection with other properties may be shown. However, it

should be noted that the taking involved in this case was by a railroad company, i. e., a quasi public use and the Court said "the rule of law applicable to condemnation of land to these quasi public uses is that its owner shall be given by way of compensation for his land its fair price for any use for which it has a commercial value of its own in the immediate present or reasonable anticipation in the near future. It is for the owner's deprivation of any existing value that he is to be compensated."

Offers are not rejected as evidence merely because they are called "offers" any more than agreements of sale are received in evidence simply because they are "agreements". The reasons for the rejection of an offer are found in the uncertainties inherent in offers or options. *The Port of New York Authority* case, supra, states that the reasons for excluding offers are expounded in *Sharp vs. United States*, 191 U. S. 341, 24 S. Ct. 114, 48 L. ed. 211 (1903), and in *Erceg vs. Fairbanks Exploration Co.*, 95 Fed. 2d 850 (9 C. C. A. 1938). Examination of the *Sharp* case indicates that among other infirmities present in an offer are these: (L. ed., page 213). It is a form of indirect evidence of the opinion of the person making the offer as to the value of the land; the offerer may have wanted the land for some particular purpose disconnected from its value; poor speculation may have induced it; there is no opportunity to cross-examine the person making the offer to show these various facts.

Even in jurisdictions where offers may be shown the test is the offer must be made in good faith by a man of good judgment acquainted with the value of real estate and of sufficient ability to pay. It must be for cash and not for credit or in exchange and it must be determined whether it is made in reference to fair cash market value of the property or to supply a particular need or fancy. *City of Chicago vs. Harrison Halstead Building Corporation*, 143 N. E. 2d 40 (Ill. S. Ct. 1957).

The agreement in question was subject to these defects.

Like an offer, Dr. Bowley was free to perform or not perform the contract at his will for it provided for his complete release if he was unable to complete the assemblage and consequently; he could terminate it by deliberate fruitless activity. Morgan, the other party, was not produced so he could be cross-examined as to his ability to perform and to find out what weighed most heavily in determining the price he had offered: the making of the assemblages or the making of the assemblage by the time for performance set out in the agreement. Without an answer to this latter question, the agreement could afford no indication of the value of the land to T. P. Morgan if the assemblage had been completed by the day of settlement, long prior to the day of taking. Considering these things, the agreement is subject to the same criticisms that bar an offer as evidence of value and is replete with the "special circumstances" which if present, bar evidence of sales to the owner. *New Jersey Highway Authority vs. Rudd*, 36 N. J. Super. 1, 5 (App. Div. 1955):

> "Where the evidence of sale to the owner presents requisite essentials and is not destitute of probative worth because of special circumstances, it is admissible."

The Courts have not been uniform in admitting agreements of sale into evidence and they were rejected in the following cases: *Crystal Lake Park District vs: Consumers Co.*, 313 Ill. 395, 404, 145 N. E. 215 (1924); *Suburban Land Co. vs. Arlington*, 219 Mass. 539, 107 N. E. 432 (1914); *Matter of Simmons*, 68 Misc. Rep. 65, 124 N. Y. S. 744 (1910); *Ottawa, etc., R. R. Co. vs. Adolph*, 41 Kansas 600, 601, 21 P. 643 (1889). See *Currie vs. Waverly and Central Railroad Company*, 52 N. J. L. 381 (E. & A. 1890), where the Court said proof of the price at which ". . . a stranger to this record had offered to sell to another stranger a piece of land

belonging to yet a third stranger but adjoining tract in question . . ." was clearly incompetent.

It would therefore seem that where the agreement of sale is an unconditional one requiring nothing but the payment of the price and the conveyance of the title to consummate it, and is recent in time it may be received as evidence of value, but where the agreement is terminable at the will of either party and depends for its fulfillment on conditions that may or may not be met, it is objectionable for the same reason that offers are rejected.

CONCLUSION.

It should always be borne in mind that the function of this petition is not to rehear the case or decide the merits.

The admission or rejection of the contract did not prevent the defendant from showing the highest and best use of his land and at the most it was merely a minor piece of corroborative evidence the exclusion of which is not such a substantial injustice as to amount to an impairment of the obligation of that contract in violation of Section 10, Article I of the Constitution of the United States or a deprivation of the petitioner's property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

The testimony showed that the agreement was speculative; speculative both as to the probability of completing the assemblage it called for, and speculative as to whether it was still a valid agreement of sale at the time of the taking; because of its inherent limitations it was no more than an offer which is never received as evidence of value.

It is therefore respectfully submitted that for the reason set forth above, the petition for writ of certiorari should be denied.

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